No. 80-251

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# Supreme Court of the United States
## OCTOBER TERM, 1980

BERNARD ROSTKER,
DIRECTOR OF SELECTIVE SERVICE,
*Appellant*

v.

ROBERT L. GOLDBERG, ET AL.,
*Appellees*

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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## BRIEF FOR AMICI CURIAE

Women's Equity Action League Educational and Legal Defense Fund, Women's Equity Action League, Federally Employed Women, National Women's Student Coalition of the United States Student Association, Women Lawyer's Association of Los Angeles, Federation of Organizations for Professional Women, American Association of University Women, National Federation of Business and Professional Women's Clubs Inc., League of Women Voters of the United States, Catholics Act for E.R.A., Michigan Education Association Women's Caucus

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## INTEREST OF AMICI CURIAE

With the consent of both parties, this brief is filed on behalf of the Women's Equity Action League Educational and Legal Defense Fund (WEAL Fund), Women's Equity Action League (WEAL), Federally Employed Women, National Women's Student Coalition of the United States Student Association, Women Lawyers' Association of Los Angeles, Federation of Organizations for Professional Women, American Association of University Women,

National Federation of Business and Professional Women's Clubs, Inc., League of Women Voters of the United States, Catholics Act for E.R.A., Michigan Education Association Women's Caucus.

Each of these groups is a national or regional organization working to assure equal opportunity and the equal protection of the laws for all citizens of the United States. Many have been particularly concerned with the status of women in the military. The WEAL Fund, for example, established the National Coalition for Women in Defense to protect and extend the rights of women employed by the armed services. It has also presented testimony to Congress and prepared publications on women in the military.

These groups can convey an important perspective to this Court not represented by the two parties. Besides the expertise they bring to the specific issue of women's participation in the armed forces, they are particularly concerned about the existence of stereotypical views on women's place in society which they believe underlie the concept of an all-male draft registration. Since appellees are all male citizens, they may not fully address the concerns of women who believe that equality under the law is not served by their absolute exclusion from registration.

## SUMMARY OF ARGUMENT

Equal rights for men and women mandate an end to an all-male draft registration. The exclusion of women from registration is based solely on archaic notions of women's role in society which this Court has explicitly rejected as a valid foundation for legislative classifications. It echoes the stereotypic notions about women's proper place in society that in the past promoted "protective" labor laws and the exclusion of women from juries and the legal pro-

fession. Until women assume their equal share of societal obligations, they will retain their inferior status.

The appropriate standard for review is the prevailing test for sex-based classifications first enunciated in *Craig* v. *Boren*. Any dilution of the standard of review for gender-based classification would undermine the strides towards equality which this Court has charted in the last decade. Heightened review of the all-male registration, and a finding of its unconstitutionally will help to assure that women are not judged on the basis of their sex, but instead evaluated on their individual abilities.

This Court has applied its heightened standards of review in race and sex discrimination cases involving the military. The Government's contention that this Court's decision in *Schlesinger* v. *Ballard* dictates the more relaxed, rational basis standard of review is erroneous. As the opinion itself reveals and this Court later acknowledged, that case applies an intermediate level of scrutiny. Moreover, *Califano* v. *Webster* definitely establishes that the *Craig* standard applies in cases which, like *Ballard,* involve statutes designed to compensate for discrimination against women.

The District Court correctly applied the standard this Court has employed in *Craig* and its progeny. The Government's argument that the male-only registration requirement is mandated by the existing prohibitions against women in combat is unsupported by the evidence presented to the Congress. The purpose of registration is to provide the means for early delivery of inductees in an emergency. Military witnesses who testified on the registration issue, including the then members of the Joint Chiefs of Staff, indicated that this purpose would be served by including women in the registration, and recom-

mended that women be so included. No government military witness testified that registering women would, because of the combat bar, diminish military flexibility. Moreover, the Government itself concedes that the combat bar may be eliminated at any time. In view of this, registering women today can only increase military flexibility and the military's ability to mobilize, should the combat bar eventually be eliminated.

Apart from this, this Court should not uphold the constitutionality of one statute on the basis of another statute or policy which, while not at issue here, is itself presumptively unconstitutional. The combat bar is facially discriminatory; that is, it exempts all women, no matter how willing or able any individual woman might be, from combat, close combat support or combat rotation positions. Thus it raises the presumption of unconstitutionality and therefore requires careful analysis of the reasons for adoption of the bar. Without such review, which cannot be had here since the combat issue itself is not before the Court, no assumptions can be made that the bar is constitutional and therefore justifies other forms of discriminatory treatment.

*Schlesinger* v. *Ballard* does not support the Government's theory to the contrary. There the statutes in question — which allowed female navy officers more time to achieve promotion than men — were upheld by this Court as a remedial measure designed to alleviate the discriminatory effects of the combat bar, which limited women's employment opportunities and consequently their opportunities for promotion. Here, however, the prohibition against registering women has no such remedial purpose. Instead, it creates a second barrier to women's full participation in the military and reinforces women's second-class status as citizens.

Thus, the total exclusion of women from draft registration violates the Due Process Clause of the Fifth Amendment. The Court may repair that constitutional defect either by invalidating the statute or by extending its provisions to include women.

## ARGUMENT

### I. THE ALL-MALE DRAFT REGISTRATION REINFORCES SEXUAL STEREOTYPES AND DENIES WOMEN EQUAL RIGHTS AND RESPONSIBILITIES OF CITIZENSHIP

The all-male draft registration[1] is based on stereotypical views about women which are completely at odds with contemporary reality. *Califano* v. *Goldfarb,* 430 U.S. 199, 207 (1977). It denies women the opportunity to participate fully in the responsibilities as well as the rights of citizenship.

The underlying basis of an all-male registration appears in earlier cases challenging the draft, in which the courts candidly acknowledged the Congressional rationale:

> In providing for involuntary service for men and voluntary service for women, Congress followed the teachings of history that if a nation is to survive, men must provide the first line of defense while women keep the home fires burning.

*United States* v. *Cook,* 311 F. Supp. 618, 622 (W.D. Penn. 1970), *citing United States* v. *St. Clair,* 291 F. Supp. 122 (S.D.N.Y. 1968). It is precisely this "Congressional chivalry in drafting men only," *United States* v. *Clinton,* 310 F. Supp. 333, 336 (E.D. La. 1970), that perpetuates the myth that women are in need of protection, and relegated to the sphere of home and family.

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[1]The Military Selective Service Act, 50 U.S.C. App. § 451 *et seq.* (the "MSSA").

There is evidence that the recent failure to require women as well as men to register was premised on similar assumptions. In its report recommending the exclusion of women from registration, the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Forces relied on the "unprecedented strains on family life that would be caused by a female draft." 126 Cong. Rec. S 6531. (daily ed. June 10, 1980) (remarks of Sen. Warner). By ignoring the family trauma also generated when males are drafted the committee perpetuated the "role-typing society has long imposed on women." *Stanton* v. *Stanton,* 421 U.S. 7, 15 (1975).

The exclusion of women from draft registration reinforces the notion that women are destined to remain in the home, and that only the male is fit for "the marketplace and the world of ideas." *Id.* at 14-15. It ignores the vast data indicating that women have successfully served in the armed forces and make a substantial contribution to the military. *See* p.13 n.11, *infra.* It disregards the expertise of military authorities who overwhelmingly favored the inclusion of women in draft registration. *See* p. 28, n.23, *infra.* It further overlooks the increased participation of women in vocations from which they have been traditionally excluded.[2] Selective Service authorities recognized

[2]The same stereotypical thinking about the role of women in society which currently prevents women from serving in combat once prevented women from serving as police officers. Aided in part by litigation, women are now generally deployed throughout police departments. *See Blake* v. *City of Los Angeles,* 595 F.2d 1367 (9th Cir. 1979); *Officers for Justice* v. *Civil Service Commission of San Francisco,* 395 F. Supp. 378 (N.D. Cal. 1975). Studies have shown that women police officers perform acceptably in critical tasks, *e.g.,* high risk felony vehicle stops, use of firearms and carrying prisoners or victims in varying terrain. *See* National Information and Research Center of Women in Policing, Performance Evaluations Information Packet (June 1980).

that the administration policy favoring the registration of women

> is a recognition of the reality that both men and women are working members of our society. It confirms what is already obvious throughout our society – that women are now providing all types of skills in every profession. The military is no exception.

*Military Draft Registration: Senate Hearings Before the Committee on Appropriations on H.J. Res. 521,* 96th Cong., 2d Sess. 80 (1980).

The all-male registration is one of a myriad of practices that have fostered discrimination against women under the guise of a concern for women's health, safety, and "rightful" place in the home.[3] *Muller* v. *Oregon,* 208 U.S. 412, 420-22 (1908) was once the authority for upholding a host of protective labor laws. It is now apparent that that case served as a "road block to full equality of women"[4] because the single sex labor laws prevented women's access to the more lucrative employment opportunities.[5] In *Muller,* the Court expounded the view that:

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[3]*See e.g., Goeseart* v. *Cleary,* 335 U.S. 464, 466 (1948), overruled by *Craig* v. *Boren,* 429 U.S. 190, 210 n.23 (1976); *Radice* v. *New York,* 264 U.S. 292 (1924) (upholding statute preventing women from working in restaurants at night); *Miller* v. *Wilson,* 236 U.S. 373 (1915) (upholding maximum eight hour day and forty-eight hour work week for women).

[4]Johnston and Knapp, *Sex Discrimination by Law: A Study of Judicial Perspective,* 46 N.Y.U. L. Rev. 675, 698 (1971), *quoting* Murray, *The Rights of Women,* in *The Rights of Americans* 521, 525 (N. Dorsen ed. 1971).

[5]These laws have repeatedly and successfully been challenged under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq. See, e.g., Rosenfeld* v. *S. Pac. Co.,* 444 F.2d 1219 (9th Cir. 1971).

> woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. . . . [H]er physical structure and a proper discharge of her maternal functions . . . justify legislation to protect her from the greed as well as the passion of man.

*Id.* at 422.

The guise of protectionism has not only permeated the workplace, but has even entered the courtroom. The same rationale for excluding women from the draft and registration – that they are physically and psychologically weaker than men and constitute the center of family life – has been offered to prevent them from becoming lawyer.[6] These concerns have also been expressed in cases upholding the exclusion of women from juries:

> The legislature has the right to exclude women so they may continue their service as mothers, wives and homemakers, and also protect them (in some areas, they are still upon a pedestal) from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial.

*State* v. *Hall,* 187 So.2d 861, 863 (Miss.), *appeal dismiss-*

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[6]"Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband." *Bradwell* v. *Illinois,* 83 U.S. (16 Wall) 130, 141-42 (1872) (Bradley, J., concurring).

*ed,* 385 U.S. 98 (1966). *See also Hoyt* v. *Florida,* 368 U.S. 57 (1961).[7]

In recent years, the courts have struck down such discriminatory provisions and have recognized that measures once justified on the grounds that they protected women have not in fact protected them but have operated to their detriment.[8] *See, e.g., Frontiero* v. *Richardson,* 411 U.S. 677, 684. ([D]iscrimination . . . rationalized by an attitude of 'romantic paternalism' . . . in practical effect, put[s] women, not on a pedestal, but in a cage.") The male-only registration likewise operates to the detriment of women.

The total exclusion of women from registration and possible conscription deprives them of significant economic benefits as well as important social and political rights. Higher enlistment standards and quotas for women have created barriers to female enlistment. This tradition,

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[7]In *Hoyt,* the Court upheld the absolute exemption of women from jury duty on the grounds that "woman is still regarded as the center of home and family life." *Hoyt* v. *Florida* 368 U.S. at 62. *See also Leighton* v. *Goodman,* 311 F. Supp. 1181, 1183 (S.D.N.Y. 1970), which asserted that the great majority of women "constitute the heart of the home, where they are busily engaged in the 24-hour day task of producing and rearing children, providing a home for the entire family, and performing the daily household work, all of which demand their full energies." *Cf. Abbott* v. *Mines, 411 F.2d 353, 355 (6th Cir. 1969).*

[8]*See Duren* v. *Missouri,* 439 U.S. 357 (1979); *Taylor* v. *Louisiana,* 419 U.S. 522 (1975); *Rosenfeld* v. *S. Pac. Co.,* 444 F.2d 1219; Babcock, et al, *Sex Discrimination: Causes and Remedies* 270-71 (listing cases striking down single-sex labor laws).

coupled with exclusion from registration, conveys the message that it is not suitable for most women to participate in military duty and to receive its concomitant benefits.

The defense establishment is the largest single employer in the United States. M. Binkin and S. Bach, *Women and the Military* 31 (1977). As is frequently advertised in recruiting drives, the armed services provide important paid training and experience in a wide variety of occupations. *Id.* The military offers women "nontraditional" occupations which provide the qualifications for lucrative employment upon their return to civilian life. Furthermore, unlike the wages received by civilian women, military women receive wages equal to the wages received by men. *Id.* at 32. The earnings of military personnel generally are approximately the same as the earnings of male civilians, which far exceed the earnings of female civilians. *Id.*

The numerous benefits afforded to military personnel are well-known – medical coverage for members as well as their dependents, housing and child care facilities, tax advantages, provisions for burial, and travel and transportation allowances. Other benefits include commissary and exchange privileges and low-cost insurance.

Upon completion of active duty, service veterans may qualify for numerous other benefits: generous pensions, *see* 10 U.S.C. §§ 3883-3992 (Army), 10 U.S.C. §§ 6321-6332 (Navy and Marines), 10 U.S.C. §§ 8883-8992 (Air Force); federal employment preferences, *see* 5 U.S.C. 2108, 3309-3318; burial benefits, *see* 38 U.S.C. §§ 901-908; vocational rehabilitation, *see* 38 U.S.C. §§ 1501-1511; educational benefits for both veterans and their families, *see* 38 U.S.C. §§ 1601-1799;

and home and other loans, *see* 38 U.S.C. §§ 1801-1827. Many states also accord employment preferences to veterans. *See Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979). *See also*, L. Sharff and S. Gordon, 1980 *Uniformed Services Almanac*, 4-153 (1980).

The all-male registration also affects women's social and political rights. Equal rights for women and men include two important, equally significant components. One consists of equal opportunity to share benefits and rights previously limited to men, in such areas as employment, education, and the political process. But true equality also comprises a second aspect: the equal division of societal obligations and duties. If women do not share these responsibilities, the gains made in achieving rights for women will be threatened, viewed as magnanimous concessions to women's demands instead of as prerogatives justly due to equally productive members of society.

This Court has recognized the importance of equal responsibilities as well as equal rights. It has invalidated a state alimony statute that required only men to pay alimony, *Orr* v. *Orr*, 440 U.S. 268 (1979), and struck down a verdict given by a jury in which women were in effect excluded. *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). Although alimony payments and jury service, like compulsory military service, are viewed by many as a burden, advocates of equality disagree. They view such obligations as "a form of participation in the processes of government, a responsibility and right that should be shared by all citizens, regardless of sex." *White* v. *Crook*, 251 F. Supp. 401, 408 (M.D. Ala. 1973) (case striking down exclusion of women from jury duty). As Senator Hatfield said:

> The paternalistic attitude inherent in exclusion of women from past draft registration requirements

> not only relieved women of the burden of military service, it also deprived them of one of the hallmarks of citizenship. Until women and men share both the rights and the obligations of citizenship, they will not be equal.

126 Cong. Rec. 6548 (daily ed. June 10, 1980). Yet, the draft registration statute denies this responsibility to half of the possible participants, simply on the basis of their sex. It prevents women from sharing the burden of conscription with men.

The discrimination inherent in the exclusion of women from draft registration affects many other facets of women's societal role. It reinforces a pernicious stereotype that women should be less involved than men in political affairs.[9] It underscores the view that men who have fought for their country have a special right to wield political power and make political decisions. *See, Equal Rights 1970: Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary,* 91st Cong., 2d Sess. 320 (1970) (testimony of Professor Norman Dorsen).

The inclusion of women in registration would not only signal to men that women are full participants in the political process, but would reinforce the political self-

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[9]Participants in the movement to permit 18 year-olds to vote argued that if 18 year-olds were subject to the draft, they must have access to the political process that affects foreign policy – namely, the vote. The reserve of this argument could be used to support the proposition that because women are not subject to draft registration, they should not have equal rights with men to participate in all political decisions.

image of many women. Military service itself can further this socialization process.[10]

In sum, excluding women from the obligation of registration serves as a powerful symbol of women's secondary role in this society. The statute denigrates women by including all women, no matter how strong, healthy or component.[11] It encourages other forms of discriminatory treatment and reinforces the paternalistic role that serves not to protect women but to exclude them from many of the benefits of society. The exclusion of women from registration "is unnourished by sense; . . . [and] implies a view of American womanhood offensive to the ethos of our society." *United States* v. *Dege,* 364 U.S. 51, 53 (1960).

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[10] [M]ilitary service has a substantial impact on women serving in non-traditional roles. By discovering hitherto unimagined capabilities, their self-esteem and belief in their own worth rises markedly, and they take these attitudes back into civilian life with consequent benefit for American society as a whole.

*Women in the Armed Forces: Proceedings of a Congressional Research Service Seminar Held on November 2, 1979 and Selected Readings* 11 (February 14, 1980).

[11] Armed services officials have recognized that "the great majority of the women serving in the Army today are doing so with skill, intelligence, energy, excellent discipline, and genuine commitment." Hearings before the Subcomm. on Manpower and Personnel, Senate Committee on Armed Services, March 28, 1979 (testimony of Lt. Gen. Robert G. Yerks, Deputy Chief of Staff for Personnel, U.S. Army).

## II. GENDER-BASED CLASSIFICATIONS ARE TO BE SUBJECTED TO THE HEIGHTENED STANDARD OF REVIEW ENUNCIATED IN *CRAIG* v. *BOREN* IN EQUAL PROTECTION CHALLENGES

### A. This Court Has Consistently Reaffirmed *Craig* v. *Boren* As The Prevailing Standard Of Review For Gender-Based Classifications

The appropriate standard for the review of the exclusion of women from draft registration is the prevailing test for sex-based classifications first enunciated in *Craig* v. *Boren*, 429 U.S. 190 (1976). In *Craig*, the Court declared that in order to withstand constitutional challenge, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig* v. *Boren*, 429 U.S. at 197.

This Court has consistently applied the *Craig* standard to gender classifications in equal protection challenges arising under both the Fifth and the Fourteenth Amendments.[12] It has employed the *Craig* test in cases involving classifications which discriminated against men as well as

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[12] *Compare Califano* v. *Westcott*, 443 U.S. 76, 88 (1979); *Califano* v. *Webster*, 430 U.S. 313, 316-17 (1977) (*per curiam*); *Califano* v. *Goldfarb*, 430 U.S. 199, 210 (1977) (plurality opinion) (all applying the *Craig* test to cases arising under the equal protection element of the Fifth Amendment's due process clause *with Caban* v. *Mohammed*, 441 U.S. 380, 388 (1979); *Orr* v. *Orr*, 440 U.S. 268, 279; *Craig* v. *Boren*, 429 U.S. 190, 197 (all applying the *Craig* test to cases arising under the Fourteenth Amendment's equal protection clause).

women.[13] The standard reflects the Court's desire to avoid reinforcing unwarranted sexual stereotypes. *see, e.g., Orr* v. *Orr,* 440 U.S. 268, 283 (1979); *Califano* v. *Goldfarb,* 430 U.S. 199, 211 (1977) (plurality opinion). It also serves as an important safeguard against the danger that a purportedly benign statutory provision can actually serve to penalize women. *See Califano* v. *Goldfarb,* 430 U.S. at 209, n.8: *Weinberger* v. *Weinsenfeld,* 420 U.S. 636 (1975).

The Court's consistent use of the *Craig* criterion reflects the importance of a heightened standard of review for gender classifications. Justice Stewart, in recognizing the appropriateness of the use of the *Craig* standard in reviewing sex-based classifications, declared that:

> Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination.

*Personnel Administrator of Massachusetts* v. *Feeney,* 442 U.S. 256, 273 (1979). The *Craig* standard is a demonstrably effective mechanism for reviewing the invidious effects of sex-based legislation.

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[13] *Compare Caban* v. *Mohammed,* 441 U.S. 380, 388 (1979); *Orr* v. *Orr,* 440 U.S. 268, 279 (both applying the *Craig* test to classifications discriminating against males) *with Califano* v. *Westcott,* 443 U.S. 76, 84 (1979) (applying the *Craig* standard to a classification discriminating against females). Indeed, this Court has held that the same statute could discriminate against both men and women. *Wengler* v. *Druggists Mutual Insurance Co.,* 446 U.S. , 100 S. Ct. 1540 (1980) (applying *Craig*). *See also Califano* v. *Goldfarb,* 430 U.S. 199, 208 (plurality opinion); *id.* at 223 (Stevens, J., concurring). The plurality opinion by Justice Brennan held that the challenged statute discriminated against females, while Justice Stevens concurred in the judgment because he believed the statute discriminated against males.

### B. Gender-Based Classifications in a Military Context demand a heightened standard of equal protection review

The Government contends that because registration concerns military affairs, the Court should defer to the judgment of Congress and utilize only a "rational basis" standard of review rather than the intermediate standard enunciated in *Craig* v. *Boren*.[14]

At no time has this Court stated or implied that statutes using race or sex lines in a military context demand a lower standard of review than sex or race classifications in other contexts. To the contrary, this Court's first articulation of the strictest standard of review in race cases occurred in a case involving national security. *Korematsu* v. *United States*, 323 U.S. 214 (1944). There is a sound basis for maintaining a high level of scrutiny in military cases. As the lower court in this case stated:

> It would be an incorrect and dangerous concept for the judiciary to apply a less stringent test to possible violations committed by the Congress or the executive in exercising the war powers. That power is precisely the power which historically can infringe most substantially on the civil rights of

[14]At one point, the government even suggests that this case does not involve a sex-based classification at all, stating that "this case, like *Ballard*, is more properly viewed as involving a distinction between combat eligible and combat ineligible persons . . ., as to which nothing stricter than the rational relationship test need be applied." Appellant's Brief, p. 23. This contention is doubly remarkable since it attempts to recharacterize two different provisions, both of which by their terms exclude all women from their reach. Such provisions cannot possibly be anything but gender-based classifications.

> citizens and therefore may be the one most in need of an appropriate check and balance.

Jur. St. 19a.

Race discrimination was once pervasive in our nation's military. Blacks, like women, were once almost completely barred from combat duty. As recently as the outset of the Korean War, most military leaders believed that blacks were incapable of being effective combat soldiers. R. Dalfiume, *Desegregating the U.S. Armed Forces, Fighting on Two Fronts,* 1939-1953 (1969) 79-98, 188-89, 206. Blacks were drafted under a dual draft system to serve in all black units. *Id.* Such discriminatory policies would of course be judged by the most stringent standard of review were they to occur today, despite their military context. Similarly, gender-based classifications warrant the same heightened standard of review applicable to gender cases arising in the civilian context.[15]

The government's contention that *Schlesinger* v. *Ballard* requires a lower standard of review in military cases is erroneous. Not only might the government theory

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[15]The Court below is not the only one to recognize the need for the *Craig* standard in a military context. In one of the few decisions challenging sex discrimination in the military since this Court articulated the equal protection criteria in *Craig* v. *Boren,* a federal court applied *Craig's* heightened standard of review to a statute imposing a ban on the assignment of women to most Navy ships. *Owens* v. *Brown,* 455 F. Supp. 291 (D.D.C. 1978). *Owens* is similar to this case because the exclusion of women from most Navy ships, like their exclusion from draft registration, was "against the expressed judgment of the military." *Id.* at 309. The court found the exclusion of women unconstitutional. Notwithstanding the military context of the case, the court utilized the *Craig* standard of review, affirming that in sex discrimination cases "a single standard seems to have emerged." *Id.* at 305.

permit a lesser standard of review to be applied to racial classifications in the military, it also fails to take into account the evolution of this Court's sex discrimination precedents. Prior to this Court's decision in *Reed* v. *Reed,* 404 U.S. 71 (1971), the Court applied a relaxed standard of review in gender cases. *Goesaert* v. *Cleary,* 335 U.S. 464 (1948); *Hoyt* v. *Florida,* 368 U.S. 57 (1961). Beginning with *Reed* the Court applied a heightened standard of review to gender cases, but did not fully articulate that standard until 1976, when, in *Craig* v. *Boren, supra,* 429 U.S. 190, it declared that a gender classification must be "substantially related" to an "important governmental purpose." 429 U.S. at 197. *Craig* refers to the line of cases beginning with *Reed,* and including *Ballard,* as ones in which the Court applied a heightened level of scrutiny. *Id.* at 198-99. *Ballard* itself implicitly relied on the intermediate standard, since in the decision the Court distinguished *Reed* and *Frontiero* not on the ground that a different standard of review applied but on the ground that the gender-based classifications in those cases were based on stereotypes concerning women while the *Ballard* statute served a more important purpose. *See Craig* v. *Boren,* 429 U.S. 190, 198 n.6 ("*Schlesinger* v. *Ballard* . . . rested upon the Court's perception of the laudatory purpose [ ] of [the] law [ ] as remedying the disadvantageous conditions suffered by women in . . . military life.")

Finally, any doubt that the intermediate standard should be applied in cases such as *Ballard* that involve remedial statutes was eliminated by this Court's decision in *Califano* v. *Webster,* 430 U.S. 313 (1977). In Webster, the Court applied the *Craig* standard to a remedial statute and upheld it on the ground that it was substantially related to the important governmental objective of remedying past discrimination in the job market against women.

## III. THE ALL-MALE REGISTRATION REQUIREMENT VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

### A. Military flexibility needs stemming from restrictions on women in combat do not justify the all-male registration.[16]

The purpose of registration is to create an inventory of human resources available for the national defense[17] and "the means for early delivery of inductees in an emergency." Appellant's Brief, pp. 26-27. Although this purpose is indisputably an important one, the restriction of registration to men is irrational.

By registering both men and women, the pool from which to draw inductees in an emergency in substantially enlarged. Since adding women does not diminish the supply of men, but rather provides a large additional number of persons with a wide range of skills and capabilities which may serve our nation in times of emergency, adding

[16]The District Court dealt at length with the government's argument that all-male registration may be justified on the basis of the current exclusion of women from combat positions. Specifically, the court found that the evidence before the Congress did not support the Government's theory that having large numbers of women registered who, because of the combat bar, could not be deployed into combat or combat-related positions in time of emergency, would diminish military flexibility. Jur. St. 28a-43a. *Amici* believe the court's conclusion on this issue is correct and should be upheld. We do not repeat these arguments in detail here but emphasize instead the principal reasons the government's argument is defective.

[17]See testimony of former Army Chief of Staff Bernard Rogers that "women should be required to register . . . in order for us to have an inventory of what the available strength is within the military qualified pool in this country." Reinstitution of Procedures for Registration Under the Military Selective Service Act: Hearing on S. 109 and S. 226 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services, 96th Cong., 1st Sess. 10 (March 13, 1979).

women to the registration pool could only increase, rather than decrease, the flexibility needed to meet military needs.[18] Of course, the nature and extent of the emergency will determine what kinds of registrants are drafted and in what proportions. Registration merely increases the capacity to meet those emergency needs, whatever they might be.

During the Congressional hearings in 1979 and 1980, the Armed Services were united in their position that registration of women would not diminish military flexibility.[19] Indeed, the witnesses, among whom were the then-

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[18]The Assistant Secretary of Defense for Manpower acknowledged that "[t]he performance of women in our Armed Forces today strongly supports the conclusion that many of the best qualified people for some military jobs in the 18-26 age category will be women." Jur. St., 41a, n.30 (citing Hearings on National Service Legislation Before the Subcomm. on Military Personnel of the House Armed Services Comm. 2 (Mar. 5, 1980) (statement of Robert Pirie, Jr.))

[19]*See, e.g.*, opinion of the District Court, Jur. St. p. 30a, n.20; *see also* S. Rep. No. 96-226, 96th Cong., 1st Sess. 13-15 (1979) at 13, 14-15 (testimony of General Bernard Rogers, Army Chief of Staff; Admiral Thomas Hayward, Chief of Naval Operations; General Lew Allen, Jr., Air Force Chief of Staff; and General Louis Wilson, Commandant, U.S. Marine Corp.). Dr. Bernard D. Rostker, Director of the Selective Service System, endorsed the Administration proposal to register women. *Department of Housing and Urban Development — Independent Agencies Appropriations for 1981: Hearings Before a Subcomm. of the House Comm. on Appropriations,* 96th Cong., 2d Sess. 3-4 (Feb. 26, 1980). Secretary of Defense Harold Brown recommended at a January 29, 1979 hearing that women be included in any new legislation requiring registration. 126 Cong. Rec. S6320 (daily ed. June 5, 1980) (remarks of Senator Dole).

During his nomination hearing in 1979, the current Army Chief of Staff, Edward Meyer, testified that ". . . from a purely military point of view, a cataloguing of assets, which is what registration is, is helpful, and therefore, a cataloguing of male and female assets, with a clear understanding that they need never be called, would be useful." S. Rep. No. 96-226, 96th Cong., 1st Sess. 28 (1979).

members of the Joint Chiefs of Staff, assumed women's exclusion from combat positions, yet in spite of this either recommended or did not oppose the registration of women. (See note 19, *supra.*) This plainly constitutes a refutation of the government's argument in this case that the registration of women interferes with military flexibility because of the current bar to women in combat.

Moreover, the government concedes that "there is more than an abstract possibility that the combat restrictions on women could be lifted at some future date," Brief for Appellant at 24, n.23, and acknowledges military efforts to obtain repeal of, or to amend, existing restrictions on assignment of women to combat positions. *Id.* In view of this, excluding women from registration today seems singularly short-sighted. If and when combat bars are eliminated, the military would be in a far better position to meet military needs if persons of both sexes were already registered. Thus, the benefits from registering women are potentially even greater than the military witnesses envisioned in their testimony to Congress.

### B. This Court should not uphold the constitutionality of the male-only registration statute on the basis of the bar to women in combat which, while not at issue in this case, is itself discriminatory on its face

The government's argument in support of the male-only registration relies almost exclusively upon the anterior ban on women in combat. As discussed above, the Congressional testimony by military experts failed to provide factual support for such a link between male-only registration and male-only combat positions. For that reason alone, the government's argument should be rejected.

This Court should, in addition, decisively reject the invidious notion that an otherwise unconstitutional gender line can be justified by another gender classification, which itself is discriminatory on its face and therefore presumptively unconstitutional. As a general proposition, if one discriminatory provision justifies another, many discriminatory classifications will escape constitutional scrutiny. Traditional biases against women that manifest themselves in a statutory scheme rather than in an isolated provision will stand a better chance of survival than at present. Thus the whole fabric of laws and policies which discriminate against women will be more difficult to unravel and it will appear that this Court has place its imprimatur upon the assumptions about women and men which underlie the unchallenged gender line used to uphold the discriminatory provision before the Court. *Cf. Parham* v. *Hughes,* 441 U.S. 380 (1979) (plurality of Court used existence of Georgia's gender-based legitimacy law to justify a statute which precluded unwed fathers but not unwed mothers from recovering for the wrongful death of their children).

This court has long since passed the point where statutes employing explicit gender lines can be viewed with a presumption of constitutionality. While such a presumption may have been the reality in the era when *Muller* v. *Oregon,* 208 U.S. 412 (1912), *Goesaert* v. *Cleary,* 335 U.S. 464 (1948), and *Hoyt* v. *Florida* 368 U.S. 57 (1961), were the leading precedents on the constitutionality of explicit gender lines, in the last decade this Court has struck down a multitude of such classifications (*e.g., Califano* v. *Westcott,* 443 U.S. 76 (1979), *Orr* v. *Orr,* 440 U.S. 268 (1979); *Craig* v. *Boren,* 429 U.S. 190 (1976); *Califano* v. *Goldfarb,* 430 U.S. 190 (1976)). It is now clear that, in a case challenging an explicit gender line, the burden is on

the government to establish that the gender line is substantially related to an important governmental purpose. *Wengler* v. *Druggists Mutal Insurance Co.*, 446 U.S. , 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980)("The burden . . . is on those defending the discrimination to make out the claimed justification." 64 L.Ed.2d at 116).

The statutes and policies which exclude women from combat positions are facially discriminatory; that is, they prohibit all women, no matter how willing or able any individual woman might be, from combat, close combat support or combat rotation positions. Thus, applying the general propositions stated above, they create a presumption of unconstitutionality and require careful scrutiny of the government's justifications for its exclusionary policies.

Without such a review – which is not possible here because the combat issue itself is not before the court – no assumption can be made that the combat bar is constitutional. The origins of the combat bar in an earlier and different era raise the possibility that the bar is based on unacceptable stereotypes about women's proper role. One example of the kind of views that may have motivated the combat bar is found in the legislative history of 10 U.S.C. § 6015, the original prohibition against the use of women on Navy ships. That bar, enacted as part of the Women's Armed Services Integration Act of 1948, was passed at the behest of a single Congressman and not in response to any military request. That member of Congress stated his reasons as follows:

> I do not think a ship is the proper place for [women] to serve. Let them serve on shore in the continental United States and outside of the United States, but keep them off the

> ships. Of course, they ought to be on hospital ships.

*Hearings Before the Subcommittee on Organization and Mobilization of the House Committee on Armed Services,* 80th Cong., 2d Sess. 5690 (1948). See also opinion of the District Court, Jur. St. at 22a, n.15 (describing the "aura of male chauvinism [that] permeated Congressional attitudes toward women in the military" at the time Congress passed the Women's Armed Services Integration Act). Significantly, section 6015 was successfully challenged by women Navy personnel on the ground of sex discrimination. *Owens* v. *Brown,* 455 F. Supp. 291 (D.D.C. 1978). In that case, the court outlined the numerous ways in which section 6015 hindered women's employment opportunities in the Navy. *Id.* at 294-96. The "harsh effects" included barring women from "all but a small fraction" of the Navy's ratings and career classifications, both at sea and on shore; precluding them from developing job skills and technical expertise, thus limiting both women's advancement opportunities within the Navy and their ability to compete for civilian employment upon leaving the military; imposing a quota on the number of women permitted into the Navy, thereby limiting women's access to a Navy career and to the "numerous and economically significant veterans' benefits and preferences" that flow from completion of that career; and preventing women from "taking part in an essential national enterprise to the limits of their abilities."

The court in *Owens* discussed "the entire range of Navy duties, noncombat and combat alike," and found that section 6015 was "wholly irrational as to noncombat assignments and largely rational *but not rational enough* as to the full range of naval duties." *Id.* at 308, n.65. (Emphasis added). The court granted plaintiff's motion for

summary judgment, which sought a declaration of the statute's unconstitutionality and an injunction prohibiting defendants from relying on section 6015 "when formulating policy for the training and assignment of Navy women to duty." *Id.* at 294, 310.

Both the legislative history of section 6015 and the successful legal challenge based on it suggest that when this Court finally considers the reasons for the exclusion of women from combat and combat-related positions, those reasons will not provide an adequate justification for the combat bars.

To permit the combat gender line to justify that drawn in the registration statute is to allow one *prima facie* unconstitutional classification to justify another, a result which for the reasons stated above is improper. In addition, such reasoning would open the door to the justification of a myriad of other military policies that rest on the combat restriction. For example, the government has sought to justify higher entry-level criteria for women volunteers and quotas on enlistment of women because of the combat bar. *Owens* v. *Brown, supra,* 455 F. Supp. at 294-96. The net effect of these policies is a pervasive discrimination against women in the military and the creation of disadvantages to women outside the military as well.[20] *Ballard* itself illustrates the "seamless web" effect created by the Court's willingness to uphold a military gender line because of the antecedent ban on women in combat.

*Ballard* does not, however, support the government's theoretical construct in this case. In *Schlesinger,* women officers were allowed a longer period of time to achieve

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[20]*See generally* Brief submitted by the National Organization for Women as *amicus curiae* in this case.

promotion than men. This distinction was upheld on the ground that women had "less opportunity for promotion" than did their male counterparts because of § 6015's ban on women at sea. Thus the discrimination was permitted because it was compensatory. 419 U.S. 498, 508. *Cf. Frontiero* v. *Richardson,* 411 U.S. 677, 689 n.22 (where Court distinguishes situation before it, in which statute at issue created disadvantages for women, from situations in which the gender-based statute was designed to remedy discrimination against women). There is no such remedial purpose to the exclusion of women from registration in this case. On the contrary, that exclusion contributes to government sponsored segregation of women in the military and second class citizenship both in the military and in society at large.

In sum, the government repeatedly ties the resolution of the registration issue to the existence of the combat bar and to the fact that the combat bar is not challenged in this case. First, it would be wholly inappropriate to uphold the male-only registration on the ground that the unexamined but facially discriminatory and presumptively unconstitutional male-only combat rules require such a result. Second, the combat bar is not challenged in this case because it is irrelevant to the determination of the issue before the Court.[21] The testimony before the Congress by the military experts supported registration of women, even while assuming that existing combat bars would remain in place. Thus, the limitation of registration to men has no basis in military need and must therefore rest on the traditional views about women that historically have undergirded the Congressional treatment of women in the military.

[21]In any event, men who have been required only to register, but have not been actually drafted, almost certainly lack standing to raise the combat issue for lack of a case or controversy.

### C. The Court may terminate the male-only registration or may extend it to include registration of women

If this Court finds the male-only registration unconstitutional, it may remedy the situation in one of two ways. First, the Court may invalidate the statute altogether, leaving it to Congress to enact new registration requirements. Alternatively, the Court may repair the statute by extending it to include the registration of women. *Califano* v. *Westcott,* 443 U.S. 76, 89 (1979), quoting Justice Harlan's opinion in *Welsh* v. *United States,* 398 U.S. 333, 361 (1970).

In deciding which of these two alternatives is most appropriate – invalidation or extension – the Court must decide which of the two options is most consistent with the intent of Congress in enacting the registration requirement. As Justice Harlan noted in *Welsh,* the Court must

> measure the intensity of commitment to the residual [Congressional] policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.

398 U.S. at 365. Specifically, in this situation the Court must decide whether, faced with the knowledge that a male-only registration requirement is unconstitutional, Congress would have enacted a statute which includes women or would have chosen instead to enact no statute at all.[22] It is therefore critical to examine Congress' intention in enacting the original male-only statute.

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[22]*See* Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation,* 28 Cleveland State L. Rev. 301 (1979); Note, Extension Versus Invalidation of Underinclusive Statutes: A

The legislative history may be read to support either invalidation or extension. On the one hand, the 96th Congress deliberately chose to exclude women from draft registration.[23] It did so despite military testimony strongly favoring female registration. This fact, coupled with the fact that the registration of women is a politically sensitive issue, suggests that the Court should invalidate the statute and leave it to Congress to enact new, constitutionally permissible legislation.

On the other hand, the legislative history is equally clear that Congress believed registration was vitally important to the national security interests of the country. If this is so, invalidating the statute would severely disrupt the statutory scheme. This suggests that the appropriate remedy would be to save the statute by extending its provisions to cover women. Extension of the statute is permissible even if it requires an increased expenditure of federal funds and an additional Congressional appropriation.[24]

Remedial Alternative, 12 Colum. J. L. & Soc. Prob. 115, 121 (Fall 1975); Brown, *et al., The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 Yale L.J. 871, 913 (1971).

[23]126 Cong. Rec. S6527-6549 (daily ed. June 10, 1980); 126 Cong. Rec. H2728-2747 (daily ed. April 22, 1980). S. Rep. No. 96-789, 96th Cong., 2d Sess. 2 (1980); H. Rep. No. 96-885, 96th Cong., 2d Sess. 2 (1980); S. Rep. No. 96-826, 96th Cong., 2d Sess. 156-61 (1980). *See also* S. Rep. No. 96-226, 96th Cong., 1st Sess. 8-9 (1979).

[24]*See, e.g., Califano* v. *Westcott,* 443 U.S. 76 (1979); *Califano* v. *Goldfarb,* 430 U.S. 199 (1977); *Califano* v. *Silbowitz, 430 U.S. 924 (1977), aff'g mem.* 397 F. Supp. 862 (S.D. Fla. 1975); *Jablon* v. *Califano,* 430 U.S. 924 (1977), *aff'g mem.* 399 F. Supp. 118 (D. Md. 1975); *Weinberger* v. *Weisenfeld,* 420 U.S. 636 (1975); *United States Dept. of Agriculture* v. *Moreno,* 413 U.S. 528 (1973); *Richardson* v. *Griffin,* 409 U.S. 1069, *aff'g mem* 346 F. Supp. 1226 (D. Md. 1972) (all extending federal welfare benefits); *Jimenez* v. *Weinberger,* 417 U.S. 628 (1974); *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250 (1974); *New Jersey Welfare Rights* v. *Cahill,* 411 U.S. 619 (1973); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

In sum, either extension or invalidation would eliminate the Constitutional defect in the statute. Whatever remedy the Court chooses, *amici* submit that the statute as written is unconstitutional. This Court should declare that the Constitution requires that women must shoulder the burdens and responsibilities of citizenship equally with men, as well as share in societal benefits.

## CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the judgment of the district court holding the male-only registration statute unconstitutional should be affirmed.

Respectfully submitted,

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